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No. 76-1701

In the Supreme Court of the United States

OCTOBER TERM, 1977

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

HIRAM G. HILL, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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This reply brief will address the following contentions made by respondents in their brief: (1) that completion of the Tellico project is not warranted because its projected benefits do not outweigh its costs and alleged adverse effects; (2) that the Tennessee Valley Authority (TVA) violated the Endangered Species Act by failing to consult with the Department of the Interior concerning alternative uses of the project that would not entail impoundment of the reservoir; and (3) that the Endangered Species Act prohibits impoundment of the reservoir.

1. Respondents devote a substantial portion of their brief to an attempt to demonstrate that completion of

the Tellico project is not warranted because its projected benefits do not outweigh its costs and its alleged adverse effects; they rely particularly on a recent study of the project by the General Accounting Office (Br. 3–9, 12–18 and *passim*).

The short answer is that these arguments have nothing to do with the issues in this case. The costs, the benefits, and the overall merits of the Tellico project are for Congress to decide. Congress has considered and reconsidered the merits of the project at length. It did so before 1966, when it first appropriated funds for the project, and it has continued to do so in each succeeding year as it appropriated additional funds for the project.[1] Indeed, in 1965, when Congress was first considering the project, it deferred funding of the project for a year to consider it further (see 112 Cong. Rec. 23418 (1966)), because of opposition from a number of individuals and groups, including the Eastern Band of Cherokee Indians and the National Audubon Society (*amici* in this case).

[1] In addition to the legislative materials reflecting consideration of the project set forth in our opening brief (pp. 3, 7–18), see Hearings on Public Works Appropriations for 1966 before a Subcommittee of the House Committee on Appropriations, 89th Cong., 1st Sess., Pt. 3, 14–36, and Pt. 4, 747–784, 1002–1076 (1965); Hearings on H.R. 9220 (Public Works Appropriations, 1966) before the Subcommittee of the Senate Committee on Appropriations, 89th Cong., 1st Sess., Pt. 4, 43, 86–156, 202–246 (1965); Hearings on Public Works Appropriations for 1967 before a Subcommittee of the House Committee on Appropriation 89th Cong., 2d Sess., Pt. 2, 697–701, 753–778, and Pt. 3, 731–771 (1966); Hearings on H.R. 17787 (Public Works Appropriations for Fiscal Year 1967) before the Subcommittee of the Senate Committee on Appropriations, 89th Cong., 2d Sess., Pt. 4, 40–80 (1966), reflecting the extensive debates on the competing values of the area's historical sites, agriculture, fishing, tourist development and the flood protection, navigation, power, jobs and other benefits of the project.

In 1966, after further hearings and a debate on the floor of the House (112 Cong. Rec. 23414–23420 (1966)), Congress made the decision in favor of funding the project.

The issue in this case is whether, by enacting the Endangered Species Act of 1973, Congress countermanded its decision to proceed with the Tellico project (or whether, if so, subsequent legislation in turn countermanded the effect of that Act). The issue in this case is not whether Congress was correct in deciding that the project should be built.

Respondents' policy arguments, and their reliance on recent reconsiderations of the matter by Congress and the GAO, are beside the point for another reason. Congress remains free to make any decision it chooses with respect to the Tellico project, including decisions to dismantle the project or to defer impoundment of the reservoir pending further consideration. As the district court stated (Pet. App. 43A, n. 12), "it is not too late for Congress to refuse to appropriate the funds to complete the project." The fact that Congress (or committees or agencies of Congress) may be reconsidering the merits of a decision previously made, and may adopt a different course in the future, provides no warrant for the courts to reevaluate and overrule the decision Congress has made, or to avoid deciding what that decision was.[2]

[2] If courts were to avoid deciding difficult questions presented by existing legislation whenever the underlying merits were being reconsidered and new legislation proposed, few questions of statutory construction would be decided. See *Fortnightly Corp.* v.

Nonetheless, since respondents have undertaken to attack the Tellico project at length on policy grounds, we will respond briefly to a few of the more significant misstatements and omissions.

United Artists Television, Inc., 392 U.S. 390, 404 (Fortas, J., dissenting).

The same principle applies to possible changes of position by an agency. Thus, a recently appointed member of the TVA Board of Directors has recently stated, in a letter to the Secretary of the Interior, that he believes "a compromise is possible under existing law." He therefore suggests "asking the [C]ourt to defer judgment on this case for a six-month period to permit the parties to work out such a compromise in the public interest." Letter of S. David Freeman to Cecil D. Andrus, April 6, 1978, printed as Appendix B to this brief. The majority of the TVA Board, however, rejects this position. In their letter to the Secretary of the Interior dated March 31, 1978, Directors Wagner and Jenkins stated (p. 4): "Neither do we think that section 7 requires 'consultation' about an 'alternative' which requires *scrapping* the nearly completed project." The Board's majority rejects a proposal for asking this Court to defer its judgment in this case. Letter of Aubrey J. Wagner to Cecil D. Andrus, printed as Appendix A to this brief.

Director Wagner's term on the TVA Board expires May 18, 1978. It could be speculated that, after a new Board member is nominated and confirmed, a majority of the TVA Board might wish to reconsider the Board's position on the Tellico project. On the other hand, in view of the substantial completion of the project, the new majority may well adhere to the position of the present majority. Since it is always possible that an agency will change its views in the future on a matter presently before the Court, we have not regarded these recent statements as providing any basis for suggesting at this late date that the Court postpone the hearing or decision of this case. Most importantly, however, as pointed out in our earlier brief, Congress has made clear its intent that the Tellico project be completed in its present form, and as stated in the Wagner letter to Andrus: "Under these circumstances, it is clear to us that TVA is not at liberty to ignore these congressional directives and abandon the Tellico project as planned and built" (App. A, *infra*, p. 2A).

While respondents belittle the power-generating capacity of Tellico by comparing it to TVA's overall power capacity (Br. 5, n. 4), they fail to note that TVA is the largest producer of electricity in the United States. As Congressman Bevill stated in Appropriation Committee hearings in 1977, "[t]he Tellico project, if completed, would generate enough energy to heat 20,000 homes and would have 15 million gallons of oil or 1.8 billion cubic feet of natural gas every year."[3] In dollars, the value of the additional power that the Tellico project would produce is currently estimated by TVA at $3.5 million per year.[4] These benefits would be achieved by means of an interreservoir canal and without the expense of additional turbines.[5]

Respondents assert (Br. 5, n. 3) that the claimed annual benefits of the project are only $3.76 million. This figure, taken from the GAO Report (p. 28), includes only the "direct" benefits of the project. It does not include, as noted by the GAO Report (pp. 27–28),

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[3] Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1978, before a Subcommittee of the House Committee on Appropriations, 95th Cong., 1st Sess., Pt. 4, 265 (1977).

[4] Hearings on Endangered Species Act Oversight before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 1st Sess. 898 (1977) (hereinafter "Culver Hearings").

[5] In addition, contrary to respondents' assertions (Br. 5), the Tellico project with the interreservoir canal more than doubles the flood storage capacity of Fort Loudoun reservoir and provides needed flood control flexibility by allowing the shifting of storage capacity when there are unequal rains in the watershed. It also allows commercial navigation up 30 miles of the Little Tennessee River without installing locks in the dam (Hearings before a Subcommittee of the House Committee on Appropriations, 89th Cong., 1st Sess., Pt. 3, 14–15 (1965)).

the "secondary" benefits—enhanced employment opportunities in particular—that represent an additional $3.65 million annually. TVA has described these employment benefits as "the heart of the project, improving the quality of life in an area now characterized by unemployment, low incomes, and the outmigration of young people."[6] Respondents' assertion also overlooks

[6] TVA Comments on Revised GAO Report, Tellico Project (GAO Report, Appendix VII, p. 74 (October 14, 1977)). The relationship between the project and economic development is stated in *Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F. 2d 1164, 1169, (C.A. 6): "The purpose of the project is to foster the economic development of the three Tennessee counties through which the Little Tennessee flows. TVA has estimated that the commercial water transportation to be provided by the 30-mile channel will result in private investment of $265 million in new commercial enterprise in the Tellico area over the next 25 years and the concomitant creation of 6,600 new jobs."

The need for job opportunities in the project area was emphasized in TVA's 1971 environmental impact statement for the project (EIS 1-1-2): "The economy of Blount, Loudoun, and Monroe Counties, the three counties primarily affected by the project, is characteristic of that of rural Appalachian areas. Between 1950 and 1970 the area experienced a net out-migration of 19,000 people. Per capita personal income in the three counties ranges from 48 to 81 percent of the national average, and between about one-third and one-half of the families in the area have incomes below the poverty level."

See also the *amicus* brief filed by Monroe County and other local governmental groups, which points out (Br. 2-3) that three-fourths of the persons who left the three-county area in the 1950's and 1960's "were the younger, potentially more productive people in the 15- to 29-year age group." In comparison with the 6,600 jobs which TVA estimates will be generated by the project along the reservoir over a 25-year development period, less than 200 families made a living farming this land before it was acquired for the project. Yet respondents contend that agriculture benefits alone might produce more benefits than the impoundment (Br. 15, n. 20). As shown in TVA's comments to the GAO Report (Culver Hearings, *supra*, at 1000-1001), this contention is incorrect.

the fact that the dollar benefits cited in the GAO Report are based on 1968 dollars, and therefore do not reflect the substantial increases in the value of the benefits, particularly the power benefits, over the past decade.

Respondents are also incorrect in suggesting that the project is opposed by the people in the area and by the State of Tennessee (Br. 6-7), and that some of the project's projected benefits were undermined by the withdrawal of the Boeing Corporation from the Timberlake development (Br. 6). As the *amicus* brief of Monroe County, *et al.* states, "the Tellico project has the support of an overwhelming majority of the people of the area as shown by numerous public opinion polls" (Br. 3, citing results of four polls). As the brief also reports (*ibid.*), three times in 1977 both Houses of the Tennessee legislature, by overwhelming majorities and with the concurrence of the Governor, adopted joint resolutions endorsing the project and recommending to Congress that it be completed.[7]

2. Respondents are wrong in contending (Br. 14-18, 32-36) that TVA failed to comply with Section 7 of the Endangered Species Act, 87 Stat. 892, 16 U.S.C. (Supp V) 1536, by failing to consult with the Secretary of the Interior with respect to alternative uses of the Tellico project that would not entail impoundment of the reservoir.

[7] Respondents' discussion of the Timberlake New Town (Br. 6) overlooks the fact that TVA's estimates of the benefits of Tellico did not include benefits attributable to that development, and the further fact that Boeing stated in its letter to TVA that it was not withdrawing its participation because either Tellico or the new town was economically infeasible, but because of its own investment needs at the time.

The record reflects that TVA has made every good faith effort to protect and preserve the snail darter by all means consistent with the fundamental purpose of the Tellico project, and that TVA has consulted with the Department of the Interior and other agencies in this effort (Pet. App. 30A, 44A). As the district court found (Pet. App. 30A):

> The record shows that TVA has communicated frequently with the Fish and Wildlife Service and the State Wildlife Resources Agency about the snail darter. Several meetings have also been held with these agencies on the subject of the snail darter and its conservation.

What respondents mean by their assertion (Br. 34) that TVA has failed "to consult with the Secretary concerning the full range of project modifications available and necessary to protect the continued existence of the species" is that TVA has declined to consult with the Secretary concerning abandonment of the project. The Tellico project is and has always been a dam and reservoir project. Any "modification" of the project that does not entail a dam and reservoir is either an abandonment of the project or an initiation of some other project, or both.[8] As the district court stated in rejecting the same argument (Pet. App. 31A):

> Completion of the dam and impoundment of the river are integral parts of a project begun almost a decade ago. TVA has been moving

[8] It is undisputed that the habitat of the snail darter extends from the base of the dam upstream several miles and that any reservoir would therefore modify the habitat.

> toward this goal since ground was first broken. When the snail darter was listed on the endangered species list in November 1975, TVA was fairly close to completion of the project which has been consistently funded by Congress since 1966.
>
> The nature of the project is such that there are no alternatives to impoundment of the reservoir, short of scrapping the entire project. Modifications or alterations to the project cannot be made at this time which will insure compliance with the Endangered Species Act. Requiring TVA to consult with other agencies about alternatives not reasonably available to it would be to require TVA to perform a useless gesture.[9]

We contend that—either because of the project's advanced state of construction (see our opening brief, pp. 23–37) or because of subsequent legislation (see

[9] If it were not obvious, the legislative history abundantly demonstrates that the essence of the project is the proposed reservoir. The principal benefits for which the project was designed and funded (electrical generating capacity, increased navigation, flood control, water supply and shoreline development) require a reservoir. The various "modifications" suggested by respondents (*e.g.*, agricultural development, tourism geared to historical sites, recreation on the river in its natural state (see Br. 15–16)) would be objectives of some other project. To suggest that those objectives would be consistent with Congress's purposes in approving and funding the Tellico project would be, in the words of a former Solicitor of the Department of the Interior in a similar case, "to suggest that it was the intent of Congress in appropriating these vast sums to provide an empty monument to the engineering profession * * *." *Closure at Glen Canyon Dam*, 70 I.D. 200, 204.

Br. 38–53)—the Endangered Species Act does not require abandonment of this project. If we are correct, Section 7 of the Act, which requires agencies to consult with the Secretary of the Interior about "utiliz-[ing] their authorities in furtherance of the purposes of this Act," does not require TVA to consult with the Secretary about abandonment of the project. In the words of the district court (Pet. App. 31A), "[r]equiring TVA to consult with other agencies about alternatives not reasonably available to it would be to require TVA to perform a useless gesture." [10]

3. Respondents' arguments concerning the effect of the Endangered Species Act on projects such as Tellico are equivocal. In the main, respondents appear to endorse the view of the court of appeals that the Endangered Species Act prohibits an agency from carrying out the "terminal phases" (Pet. App. 11A) of a project if doing so will adversely affect the critical habitat of an endangered species, regardless of how advanced the stage of the project's completion when the Act was passed or when the species was listed as endangered (see Resp. Br. 26–46).

For the reasons stated in our opening brief, we believe this position to be contrary to the purpose and intent of the Endangered Species Act (Pet. Br. 23–37). Thus respondents err in contending (Br. 31) that Senator Tunney's remarks concerning the effect of the

[10] The district court further pointed out (Pet. App. 35A, n. 8): "[T]he money appropriated to [TVA] was for the Tellico Project alone and [TVA] had no authority to use the funds other than for that purpose."

Act (discussed in our opening brief, pp. 32–33) related to proposed language that was different from the language ultimately enacted. In fact, Senator Tunney read the language he was relying on, and it is virtually identical to the language ultimately enacted.[11]

At the same time, however, respondents suggest that whether the Endangered Species Act applies to a project depends on the degree to which the project

[11] The relevant discussion was as follows (119 Cong. Rec. 25689–25690 (1973)):

"Mr. TUNNEY. Mr. President, as I understand it, after the consultation process took place, the Bureau of Public Roads, or the Corps of Engineers, would not be prohibited from building such a road if they deemed it necessary to do so.

"Mr. COOK. The point is that they would then be doing it after consultation with the respective agencies, rather than making that decision on their own.

"Mr. TUNNEY. But they would have the final decision after consultation.

"Mr. COOK. The Senator has put me in a rather bad light. Under the terms of this, it would have to be under an agreement worked out with the respective agencies.

"Mr. TUNNEY. Mr. President, as I understand the legislation, just reading the language:

"'All other departments, agencies, and instrumentalities of the Federal Government shall, in consultation and with the assistance of the Secretary—

"'(b) take such action as is necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of any endangered or threatened species, or result in the destruction or modification of any habitat of such species which is determined by the Secretary, after consultation to the extent appropriate and necessary with affected States, to be a critical habitat of such species.'

"So, as I read the language, there has to be consultation. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built. That is my interpretation of the legislation at any rate."

has been completed and resources irretrievably committed to it, which is essentially the position that we take and that the district court espoused. Thus, respondents state that federal statutes have been properly applied to projects "where substantial actions remained and the law could be meaningfully applied so as to effectuate Congressional intent" (Br. 23), and that Section 7 applies here "[s]ince significant proposed federal actions remain to be taken on the proposed Tellico impoundment * * *" (Br. 38). Respondents also argue that exceptions developed in cases under NEPA do not apply here because "valuable development options not involving impoundment presently exist for the project" (Br. 43), and because there is "considerable doubt that the 'benefits' to be obtained by impoundment outweigh the benefits of other alternatives" (*ibid.*).

If respondents agree, as the foregoing statements suggest, that application of the Endangered Species Act to a project depends on the degree to which "significant * * * actions remain to be taken" and on the availability of alternative courses of action that are consistent with the basic objectives of the project, then these are issues of fact that are primarily for the district court to resolve. For the reasons stated in our opening brief, we submit that the district court properly held that the Endangered Species Act does not prohibit the impoundment of the reservoir in the circumstances of this case. There can be no serious dispute that the project was substantially completed

when the Act was passed and almost entirely completed when the snail darter was listed as endangered.[12] Moreover, as noted above, pp. 8–10, *supra* there is no basis for the claim that reasonable development options exist for this project that do not entail impoundment of the reservoir. Those may be reasonable options for some other project, but they are not reasonable options for the Tellico project that Congress has approved and funded.

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[12] There is no merit to respondents' attempt (Br. 13), for the first time in this litigation, to dispute that the project was 50 percent completed when the snail darter was discovered and the Endangered Species Act passed. For example, respondents' reliance (Br. 13) on the fact that only $35.6 million had been expended on the project through 1973 is based entirely on dollars expended rather than work completed, and is misleading under the circumstances. In December 1973 the project construction effort had only recently resumed (after a 21-month delay) following the district court's determination that TVA had fully complied with NEPA and had reached its decision to complete the Tellico project after a "good faith consideration and balancing of environmental factors." *Environmental Defense Fund* v. *Tennessee Valley Authority*, 371 F. Supp. 1004, 1015 (E.D. Tenn.), affirmed, 492 F. 2d 466 (C.A. 6). The costs of the project had increased drastically during the delay, and in January 1975 the estimated project cost of $69 million, based on a December 1975 completion date, was increased to $100 million, based on a dam closure date of January 1977 and a project completion date of December 1977. Also, in presenting their chart (Br. 13) respondents fail to note that the newly discovered snail darter was not listed as endangered until November 1975) paradoxically it was not scientifically accepted as a separate species until January 1976).

CONCLUSION

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1978.

* The Solicitor General is disqualified in this case.

APPENDIX A

TENNESSEE VALLEY AUTHORITY
OFFICE OF THE BOARD OF DIRECTORS
Knoxville, Tenn., March 31, 1978

The Honorable Cecil D. Andrus
Secretary of the Interior
Washington, D.C. 20240

Dear Mr. Secretary:

This is in further response to your March 16 letter to Mr. Lynn Seeber, our General Manager.

We welcome the opportunity to discuss the snail darter matter. The discussions, however, should be held on a basis other than the narrow confines of your letter. They certainly should be directed to the transplantation of snail darters to other suitable rivers in an effort to assure the species' survival, and also permit the project's completion and use on the basis on which Congress has made appropriations for the project. The Senate and House Appropriations Committees' reports for 1975, 1976, and 1977 direct that the Tellico project be completed as quickly as possible in the public interest; Congress has appropriated funds to complete the Tellico project based on those reports and with full knowledge of the conflict between the project and the snail darter; and the specific provisions of the 1977 Appropriations Act (Title IV of Public Law No. 95-96, 91 Stat. 797 (1977)), make $2 million in appropriations available to TVA for transplanting endangered species "to expedite project con-

struction." Congress is presently considering the Administration's budget which requests $1.846 million to complete Tellico. Under these circumstances, it is clear to us that TVA is not at liberty to ignore these congressional directives and abandon the Tellico project as planned and built. Consequently, we are unwilling to discuss the alternative mentioned in your letter.

We recognize, of course, that the Comptroller General's report to Congress on Tellico recommended that the project be restudied to determine whether it should be used or scrapped in favor of an alternative use of the Little Tennessee River Valley. We informed Congress that we did not think that the factual material reported by GAO supported its recommendation and that the recommendation should not be followed. We pointed out that this project was studied in 1977 by a team from OMB, CEQ, and TVA, as a part of President Carter's review of water projects, and found to have a remaining cost benefit ratio of 7:1. Congress has not acted on the GAO recommendation, and until it does, we cannot act on such a recommendation that is contrary to express congressional directives. As you may know, this report has been heavily criticized, even by one of the Congressmen who asked for it (124 Cong. Rec. H1462 (daily ed. Feb. 23, 1978) (remarks by Rep. Duncan)).

Among other considerations, in light of Congress's action and the advanced stage of the Tellico project, it is our view that the best way to accommodate both the snail darter and the Tellico project is through transplants to other suitable habitats. Congressional action appropriating funds for construction of Tellico, and to "relocate" the darter, clearly compels this view. Accordingly, we believe that a meeting to discuss further transplants would be productive and in furtherance of the spirit of both sections 3 and 7 of the Endangered Species Act and Public Law No. 95–96.

We are puzzled by the U.S. Fish and Wildlife Service's repeated denials of our permit applications to transplant snail darters to other suitable rivers. These proposed transplants are designed to establish new populations to better assure the species' survival. Our proposals to transplant snail darters to a Holston River site previously identified by TVA and the Service as a priority transplant site, are biologically sound and are in accord with the intent of Congress, specifically Title IV of Public Law No. 95–96, Stat. 797 (1977), which provides for transplants "as may be necessary to expedite project construction."

The transplants contemplated by Public Law 95–96, however, are being prevented by the Service's repeated denials of our transplant permit applications. Moreover, while the Service rebuffs all TVA attempts to establish new populations of snail darters, your Solicitor recently stated in an appendix to TVA's brief in the Supreme Court in the Tellico/snail darter case:

> Since closing the dam and filling the reservoir would immediately make transplantation efforts impossible, it follows that Congress specifically contemplated in the appropriations act itself that dam closure must await evidence of a successful transplant [at 10A].

The Department of the Interior apparently takes the position that closure of the dam must await a successful transplant, while at the same time denying all transplant applications. Not only are these positions inconsistent, but the continuing refusal to

grant the requested transplant permits is, in our opinion, a frustration of the purposes of Public Law No. 95-96.

In light of express congressional intent that transplants continue and the biological good sense of expanding the snail darter's range, we request that the Service reconsider the denial of our most recent permit application. Our people are available to provide the Service with any additional information which might be helpful in reviewing our permit application. If another application is needed, please let us know. We have asked Dr. Thomas H. Ripley, Director of TVA's Division of Forestry, Fisheries, and Wildlife Development, to arrange a meeting to discuss further transplants.

This brings us to two points of serious concern to TVA. Your Solicitor, in an appendix to TVA's brief before the Supreme Court, suggested that TVA has not consulted with your Department about the Tellico/snail darter problem as required under section 7 of the act. We have cooperated and consulted fully with the Service about the conservation of the snail darter from the very outset of this controversy and have tried our best to resolve the problem. Our efforts to conserve the snail darter began shortly after the fish's discovery and over a year before it was listed as endangered. Our efforts were coordinated with your staffs; biweekly progress reports and special reports were furnished to keep them current on all significant efforts and developments that occurred; staff consultation meetings were held at various stages to plan certain steps or resolve disagreements; and numerous other conversations, discussions, and meetings were held along the way. Dr. Williams of the Service testified that TVA had "always cooperated fully" and given the Service "any information" requested. In Mr. Greenwalt's October 12, 1976, letter to TVA, giving us the Service's biological opinion on the effects of Tellico on the snail darter, he stated that "your agency's cooperation in the consultation process on the Tellico Dam project has been appreciated." Indeed, even though TVA disagreed as to the biological desirability of the Service's plan to restock the Little Tennessee River with snail darters because the fish is unable to naturally sustain a population there, TVA assisted in those restocking operations. In short, we have consulted and cooperated with your Department in every reasonable way to conserve the snail darter short of scrapping the virtually completed Tellico project—a project which we have been directed repeatedly by Congress to complete in the public interest.

The basis given for your Solicitor's statement that TVA has not consulted is that TVA has been unwilling to discuss what he terms an "alternative" to Tellico which would allow preservation of the darter. The "alternative" suggested in the appendix to the TVA brief and in your letter to Mr. Seeber is a scenic river development which calls for the complete abandonment of the Tellico project and its major purposes of flood control, hydroelectric power, navigation, and employment opportunities, and for the waste of over $50 million in publicly invested funds. The hydroelectric benefits cannot be denigrated by saying that they are small as compared to the whole of TVA, the Nation's largest power supplier. For example, Tellico would provide more electricity than was generated at several of TVA's dams (Chatuge, Nottely, South Holston, Watauga, Boone,

Melton Hill, Tims Ford) in the year ending September 30, 1977. The Government, as well as other knowledgeable individuals and entities, is now recognizing that the country must utilize these renewable nonpolluting sources to help alleviate the increasingly acute energy problems. We simply do not think that the act contemplates the abandonment of a congressionally authorized project such as Tellico which was over three-quarters complete when the species was discovered and listed as endangered. Neither do we think that section 7 requires "consultation" about an "alternative" which requires *scrapping* the nearly completed project. As the district court expressly held:

> Completion of the dam and impoundment of the river are integral parts of a project begun almost a decade ago. TVA has been moving toward this goal since ground was first broken. When the snail darter was listed on the endangered species list in November 1975, TVA was fairly close to completion of the project which has been consistently funded by Congress since 1966.
>
> The nature of the project is such that there are no alternatives to impoundment of the reservoir, short of scrapping the entire project. Modifications or alterations to the project cannot be made at this time which will insure compliance with the Endangered Species Act. Requiring TVA to consult with other agencies about alternatives not reasonably available to it would be to require TVA to perform a useless gesture [*Hill* v. *Tennessee Valley Authority*, 419 F. Supp. 753, 758 (E.D. Tenn. 1976)].

Finally, we request that you consider the cavalier manner in which the Service handled TVA's petition

to delist the Little Tennessee River as critical habitat for the snail darter. By letter dated February 28, 1977, we sent you a copy of TVA's petition to delist, the original of which was mailed the same day to the Director of the Service. Because of the importance of the matter to TVA and the region, we asked for an opportunity to meet with you and discuss the matter in some detail. Your April 18 reply, signed by Jim Joseph, suggested that a meeting be deferred until the petition had been thoroughly reviewed.

On December 5, 1977, over nine months after the filing of the petition to delist and after several TVA inquiries about the petition, we were informed by letter from the Associate Director of the Service that the petition had been denied. No consultation with TVA had occurred. No notice that the petition was being reviewed had been published in the *Federal Register*, and the December 5 letter gave no reasons for the denial. In fact, the letter stated that the petition had been indirectly denied as a part of the Service's July 6, 1977, denial of TVA's application for a permit to transplant snail darters. Yet, TVA was not informed of this until December 5, 1977, over five months after the decision was apparently made. Even then, there was a great deal of confusion in the Service about the status of the petition, as several Service staff members familiar with the petition informed TVA staff in late November that a decision had not as yet been made.

We feel that a matter of this importance should receive the thorough review suggested in your letter to us rather than being denied indirectly as a part of the denial of another separate matter. The petition was supported by detailed biological evidence which, as far as we know, is essentially undisputed; and we

believe that if it receives a thorough, objective review it will be granted.

Again we want to emphasize our desire to work with the Service to conserve the snail darter. Through the combined effort of our organizations and through transplants of snail darters to other suitable rivers as contemplated by Public Law No. 95–96, we believe that a successful accommodation of both the project as now built and the snail darter can be achieved.

This letter reflects the views of myself and Director Jenkins; and Director Freeman will respond separately.

Sincerely yours,

AUBREY J. WAGNER,
Chairman.

cc: Mr. James T. McIntyre, Jr.
Director
Office of Management and Budget
Executive Office Building
Washington, D.C. 20503
Mr. Charles H. Warren, Chairman
Council on Environmental Quality
722 Jackson Place
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Office of the Solicitor General
Department of Justice
Washington, D.C. 20530
Mr. Elmer B. Staats
Comptroller General
General Accounting Office Building
Washington, D.C. 20548

APPENDIX B

TENNESSEE VALLEY AUTHORITY
OFFICE OF THE BOARD OF DIRECTORS
Knoxville, Tenn., April 6, 1978

The Honorable Cecil D. Andrus
Secretary of the Interior
Washington, D.C. 20240

Dear Mr. Secretary:

This is my response to your letter of March 16 to TVA requesting consultation on the Tellico Project.

I am much less concerned about the snail darter than I am the people in the Tellico area who are without jobs, people whose welfare is endangered by this seemingly endless dispute. I take your letter as an offer to apply some common sense to the current impasse by fashioning a reasonable compromise that will enable the government to complete the project promptly.

In my view, such a compromise project must provide jobs for people in the area as well as other benefits for present and future generations that will maximize the government's investment.

I have made no judgment on the Tellico Project, but I have been briefed by the TVA staff. Based on that briefing, I believe such a compromise is possible under existing law. There are alternatives to the current Tellico proposal other than scrapping the project. The TVA staff is now studying such alternatives.

For example, one option would be to utilize the near completed dam as a "dry dam." Such an alternative

project would provide more flood control protection in a severe flood than the existing project; would provide food from the rich bottom land valued in excess of $5 million per year, rather than a small quantity of hydropower (less than one-fifth of 1 percent of TVA's needs) with a comparable or smaller value; would maintain a free-flowing stretch of river for recreation rather than forming a lake; would preserve the ancestral home of the Cherokees as a source of tourism rather than flooding these artifacts; and would provide industrial sites and jobs comparable to the existing project.

I do not know whether such a redesigned project would be superior to the current design or not because the TVA staff studies have not been completed, and there has been little or no public discussion of the comparative benefits of the two approaches by the public. I do know that such a project is a possibility.

Another possible option for compromise would be to go ahead with the industrial development immediately and monitor the snail darters in the Hiawassee Reservoir for a period of three years, and if the fish survive, TVA would then be free to form the lake if that best served the public interest.

The choice is not the snail darter or the dam. The industrialization and other benefits to the economy can take place with or without another lake as soon as the controversy can be settled and the choice industrial sites TVA now owns can be made available with certainty.

A decision by the Supreme Court will not end this controversy because each side has stated it will carry on the fight in another forum if it loses. The current litigation and dispute can thus lead only to further delay and waste of the taxpayer's money. And contrary to the TVA position, forming a permanent lake is not vital to the Tellico project and may not even be the option with the greatest public benefits.

I therefore favor consultations to review the possible alternatives under existing law with an early deadline to hammer out a compromise that places the highest priority on benefits for people. I also favor asking the court to defer judgment on this case for a six-month period to permit the parties to work out such a compromise in the public interest.

Sincerely,

S. DAVID FREEMAN,
Director.

cc: Mr. Charles H. Warren, Chairman
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722 Jackson Place
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